RECENT ENGLISH DECISIONS.

In the Court of Common Pleas.

TARRANT *vs.* WEBB.

1. It is a well established rule of law, that a servant cannot ordinarily sue his master for an injury sustained through the negligence of a fellow-servant; but the master is bound to use due care in the selection of competent servants, and is liable for negligence in employing incompetent persons.
2. He is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him.

This was an action for injury done to the plaintiff by the falling of a scaffolding; and the declaration alleged that the plaintiff was employed to do certain work for the defendant on a scaffolding erected by the defendant for that purpose, and that the defendant so carelessly and negligently erected the scaffolding that the plaintiff was exposed to unreasonable risk, and the scaffolding gave way, and the plaintiff was thrown therefrom, and seriously injured.

Plea—Not guilty.

At the trial, (*coram* Crowder, J.,) at the Middlesex sittings in Trinity term, it appeared that the scaffolding was erected by a servant of the defendant; and the learned judge, in summing up, told the jury that the defendant would be liable if he employed incompetent persons to erect the scaffolding. It did not appear that the defendant knew his servant to be incompetent. Upon this the jury found a verdict for the plaintiff, with 25*l.* damages.

A rule *nisi* for a new trial was obtained on the ground of misdirection, for that the employment by the defendant of incompetent persons simply would not make him liable, and at all events would not do so unless he knew of the incompetency, and the plaintiff did not.

Udall showed cause.—The evidence showed that the parties knew that it was necessary, in order to make the scaffolding safe, to use a pole, which was not used. The objection made to the

summing up of the learned judge was this: the case of *Wigmore* v. *Jay* (5 Exch. Rep. 354; s. c. 19 Law J. Rep. (N. S.) Exch. 300) was handed up to him and relied upon, and he ruled, according to that case, that the ordinary rule as to the responsibility of a master for the negligence of a servant does not apply where the person injured is a fellow-servant, unless there be evidence that the person employed, and who caused the injury, was an improper person to employ for the purpose in question. But it is now contended, that another proposition is to be added to this doctrine, and that, in order to recover against the master, it must be shown affirmatively by the plaintiff that the master knew that the servant employed was incompetent. That is a principle which ought not to be established. The question was very fully considered in the case of *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*, (5 Exch. Rep. 343; s. c. 19 Law J. Rep. (N. S.) Exch. 296.) That was an action by the representative of a servant of the railway company, killed by the negligence of another servant in guiding a locomotive engine. The company pleaded that the collision happened by the negligence of their servants employed in guiding the engines, &c., and not otherwise, and that their servants were fit and competent persons for this purpose, and the plea was held good.

[JERVIS, C. J.—It may not be necessary for the other servants to make out that the master knew of the incompetency of his servant, but it may be enough to say that he was bound to use ordinary care to employ competent persons.]

The learned judge told the jury that if they thought the defendant interfered in the erecting of the scaffolding, or that the person he employed was incompetent, they should find for the plaintiff. It is contended that that was a proper direction.

[JERVIS, C. J.—As to both points, it seems to me that it was necessary to add something more. As to the first, if the defendant interfered with competent skill, he would not be liable.]

In the judgment in *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*, (5 Exch. Rep. 351,) Alderson, B. says that "the master is not in general responsible when he has selected persons of competent care and skill."

[JERVIS, C. J.—It is not that the master must warrant the competency of the persons whom he employs, but that he must take care to select for the work persons who are competent.]

In the ordinary case, where a servant, incompetent to drive a carriage, does drive, and causes an accident, the master is liable.

[CRESSWELL, J.—But that is not the case of injury to a fellow-servant.]

In *Skip* v. *The Eastern Counties Railway Company*, (23 Law J. Rep. (N. S.) Exch. 23,) Parke, B., says the company "are indeed bound to see that their servants are persons of proper care and skill," but that is all. In the case of *Patterson* v. *Wallace & Co.*, (1 M'Queen, 748,) in the House of Lords, there is no qualification of the rule laid down in *Wigmore* v. *Jay*. Lord Cranworth said, that the law of England agreed with that of Scotland, in holding that a master is bound to take all reasonable precautions for the safety of his workmen.

[CRESSWELL, J.—Is not the real distinction this: that when an injury is done by one servant to another, the rule of *respondeat superior* does not apply? In such case the servant injured is bound to go further, and to show negligence in the master in order to make him liable. In a case of this kind, the negligence which causes the wrong is that of the servant, and not that of the master; and the question then arises whether there was any negligence in the master in not employing competent servants.]

M. Smith and *G. B. Hughes* appeared to support the rule, but were not called upon by the court.

JERVIS, C. J.—I am of opinion in this case that there must be a new trial. The rule is now established, that if a workman meets with an injury from the negligence of a fellow-workman, no action will ordinarily lie against the master. As my brother Cresswell has put it, the superior is not responsible as between his servants, but he may be liable in case of negligence of his own. There may be a doubt as to the policy of the law, but it is now quite a settled one. Negligence may consist of more than one matter; but it cannot exist if the master does his best to employ competent persons. He cannot warrant the competency of his servants. The jury in this

case might have been of opinion that the defendant had taken great care in the selection of the person who erected the scaffolding, and yet that he was incompetent for the work. I think, therefore, that the rule for a new trial ought to be absolute.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

[FROM 2 E. D. SMITH'S REPORTS.]

ACTION.

Negligence—Left hand track of Road.—In an action brought in the marine court by the owner of a horse and cart, for injuries caused by a collision with one of the cars of a railroad company, the justice charged the jury, "that if the plaintiff was, in their opinion, doing his best to get out of the defendant's way it was all that could be required of him; that if he was so doing, the defendants were bound at their peril, to stop their cars to avoid collision; and if they had not sufficient power to do so, or if they omitted to stop their cars, they were responsible for the consequences." *Held*, that the charge being in effect, that if neither party was in fault, the plaintiff was entitled to recover, was palpably erroneous and unjust. *Altrueter* vs. *The Hudson River Railroad Co.*, p. 151.

Held, also, that the question, whether the defendants were guilty of negligence, was as material as whether the plaintiff was; and should have been made the primary question, instead of reversing the order, and telling the jury that if the plaintiff was not guilty of negligence, they must assume that the defendants were. *Ib.*

The mere fact that a car of a railroad company in the city of New York is proceeding on the left-hand track, will not of itself, charge the company with fault, and subject them to damages resulting from an accident. *Id.*

Passenger's baggage—Liability on continuous roads.—A passenger procured a ticket for Montreal, at the office of the New Haven Railroad Company, in New York; instead of giving his valise into the charge of the agents of the company and receiving their check therefor, he proceeded with his valise in his own charge to New Haven, the terminus of the company's